

AUG 16 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. **76-2311**

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA
and THE COUNTY OF NASSAU, NEW YORK,

Petitioners,

v.

WILLIAM T. COLEMAN, JR., ET AL.,

Respondents,

BRITISH AIRWAYS, ET AL.,

Intervenors.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT AND APPENDIX**

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**PETITION FOR A WRIT OF CERTIORARI TO THE
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DISTRICT OF COLUMBIA CIRCUIT**

The petitioners Board of Supervisors of Fairfax County, Virginia and County of Nassau, New York, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on May 19, 1976.

Opinion Below

The order of the Court of Appeals, entered without opinion appears in the Appendix at page 1a.

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on May 19, 1976, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court rests on 49 U.S.C. §1486(f) and 28 U.S.C. §1254 (1).

Questions Presented

1. Whether the decision of the Secretary of Transportation to permit commercial SST flights into the United States prior to the promulgation of supersonic aircraft noise regulations was arbitrary and capricious in view of the clear expressed will and intent of Congress in enacting the Noise Control Act of 1972?

2. Considering the expressed will and intent of Congress that supersonic aircraft noise regulations be promulgated, did the court below err in affirming the Secretary of Transportation's decision to permit such flights in the absence of such regulations?

3. Whether in the face of strong evidence that the Secretary's decision may have been influenced by factors *dehors* the record, the Court of Appeals should have remanded the cause for plenary review or to perfect the record?

Statutory Provisions Involved

(Texts are set forth in the Appendix)

Federal Aviation Act §§611 & 1001, 49 USC §§1431 & 1486

Administrative Procedure Act 5 USC §706

Noise Control Act of 1972, §§2 & 12(a), 42 USC §§4901 & 4911

Statement of the Case

On February 4, 1976 William T. Coleman Jr., U. S. Secretary of Transportation directed the Federal Aviation Administrator to "order provisional amendment of the operations specifications¹ of British Airways and Air France, to permit those carriers, for a period of no longer than 16 months from the commencement of commercial service" to conduct flights of the Concorde Supersonic Transport (SST) into the United States specifically Dulles International Airport in Virginia and John F. Kennedy International Airport (JFK) in New York. (Secretary's Decision on Concorde Supersonic Transport, p. 3) Superficially, the Secretary's decision was preceded by: a) applications by British Airways and Air France for such amendment in August and September of 1975, b) publication by the Federal Aviation Administration (FAA) of a draft environmental impact statement (EIS) on March 3, 1975, c) a series of public hearings in April 1975, d) release of

¹ The requirement that foreign air carriers operate in accordance with "operations specifications" is the mechanism which gave rise to Secretary Coleman's decision and is found in Part 129 of the Federal Aviation Regulations, 14 C.F.R. Part 129. "Operations specifications" are not mentioned in any statute. They were devised by the Federal Aviation Administration pursuant to its authority under three sections of the Federal Aviation Act of 1958: (1) §601(a)(6), 49 U.S.C. §1421; (2) §313(a), 49 U.S.C. §1354(a); and (3) §1102, 49 U.S.C. §1502. Under the requirement, foreign air carriers must apply for operations specifications, or an amendment thereto, before operating an airplane to and from the United States. They must list the type of aircraft to be flown, the airports to be served, and the routes and flight procedures to be followed by a particular airplane. The amendments sought by British Airways and Air France, and granted by Secretary Coleman, permit those two carriers to conduct two daily Concorde flights each to John F. Kennedy International Airport (JFK) in New York and one daily Concorde Flight each to Dulles International Airport (Dulles) in Virginia, a total of six take-offs and six landings in the United States each day.

the final EIS on November 13, 1975, and e) a public hearing on the final EIS on January 5, 1976.

With the announcement of Secretary Coleman's decision, the petitioners, as large suburban counties² directly affected by the proposed *Concorde* operations, filed a petition in the Court of Appeals for the District of Columbia under 49 U.S.C. §1486 to review and set aside the Secretary's decision. Simultaneously, the Circuit Court was asked to consider an appeal from the U. S. District Court in an action previously commenced by the petitioners seeking injunctive relief against the implementation of the Secretary's order to the FAA Administrator, and for other relief. This petition seeks to review that portion of the Court's judgment affirming the Secretary's decision of February 4th, 1976.

Subsequent to the filing of Fairfax and Nassau's petition to review in the Court of Appeals, the FAA Administrator caused the operations specifications to be amended and the matter was set down for oral argument on May 19, 1975 at 1 P.M., five days before the inaugural commercial Air France flight was scheduled to arrive in the United States.³ Underscoring the international importance attached to

² Dulles International Airport is partially located in Fairfax County which has a population of approximately 600,000 people; Nassau County, New York has a population of 1.5 million people, of whom over 225,000 reside under or within the sonic "footprint" of proposed SST arrivals and departures at John F. Kennedy International Airport (JFK) located in adjacent Queens County.

³ By resolution of the Board of Commissioners of the Port Authority of New York and New Jersey (the proprietor of John F. Kennedy Airport) *Concorde* flights into the New York area are prohibited for six months pending study of the effects of SST arrivals into Dulles. An action to enjoin the Port Authority enforcing this regulation by Air France and British Airways is pending in the U. S. District Court for the Southern District of New York and scheduled for trial in September of 1976.

this event the President of France Monsieur Giscard D'Estaing himself arrived for a state visit via *Concorde* on May 18th. At 5 o'clock in the afternoon of May 19 the Court of Appeals affirmed, without opinion, the Secretary's decision. (App. p. 1a)

REASONS FOR GRANTING THE WRIT

I.

The decision of the Secretary of Transportation permitting commercial SST flights into the United States prior to the promulgation of supersonic aircraft noise regulations directly contradicts the expressed will and intent of Congress; as such its affirmance in the Court below presents special and important questions of federal law which should be settled by this honorable Court.

Section 611 of the Federal Aviation Act of 1958, (49 U.S.C. §1431), as amended by the Noise Control Act of 1972, imposes a nondiscretionary duty on the Federal Aviation Administrator, after consultation with the Secretary of Transportation and with the Environmental Protection Agency, to promulgate in a timely fashion aircraft noise regulations aimed at protecting residents in areas near airports from excessive aircraft noise. Section 611 (c) establishes a detailed procedure and specific time schedule for the development of such regulations.

Pursuant to this mandate, the Administrator or his predecessors, did cause rules to be promulgated regulating future *subsonic* aircraft (14 C.F.R. §36; FAR, part 36). But the treatment of supersonic aircraft was markedly different. To date, some eight and one-half years after §611 was enacted and four years after the passage of the

Noise Control Act, the FAA Administrator has utterly failed and refused to promulgate regulations providing for the control and abatement of aircraft noise and sonic boom relative to such *supersonic* aircraft.

Secretary Coleman pointed this out in his decision at p. 15 when he said "[t]he Administrator has exercised this authority with respect to subsonic aircraft, [citing 14 C.F.R., §36] but he has not promulgated a noise rule applicable to supersonic aircraft, although the EPA has proposed several alternatives." It is submitted that the non-discretionary character of this duty to promulgate noise regulations was established by Congress which reviewed this legislative mandate on at least two recent occasions and, congressional intent in this area is abundantly clear.

The nondiscretionary character of the Administrator's duty is emphasized by the use of the verb "shall", Congress having made a point of selecting mandatory rather than permissive language in enacting Section 611. (H.R. Rep. No. 1463, 90th Cong. 2nd Sess. 2 (1968) note 16, at 5). As the House Committee on Interstate and Foreign Commerce explained:

"... the introduced bill merely *authorized* the establishment of standards, rules and regulations and their application in the certification process. The bill reported by the committee (and enacted) *requires* their establishment and application." *Id.* (Emphasis in original)

See 114 Cong. Rec. 16384-99 (House), 20915-31 (Senate) (1958)

The persistent failure of the FAA to enact supersonic noise regulations pursuant to §611 as originally enacted spurred Congress to amend it when it considered the Noise

Control Act of 1972, 42 USC §4901 *et seq.* Congressional debate was rife with repeated criticism of FAA and its failure during the preceding three and one-half years to develop aircraft noise standards.

Senator Percy: "*The FAA has abdicated the regulatory responsibilities Congress has entrusted to it.*" 118 Cong. Rec. 18006 (1972)

Senator Muskie: "*The Federal Aviation Administration has had this responsibility since its inception. It had a specific legislative mandate for the past four years. And its record is wholly inadequate.*" 118 Cong. Rec. 17755 (1972)⁴

Despite the passage of more than four years since the enactment of the Noise Control Act and the clear time schedule provided therein, the FAA has adamantly refused to develop supersonic noise standards. The conclusion that the FAA has breached its statutory duty is inescapable.

Nor was the effect of the FAA's nonaction lost upon the Secretary. At page 17 of his decision, he said, "I must therefore conclude that the absence of a noise rule promulgated under the Federal Aviation Act does not compel a decision either way on whether the Concorde should be permitted to land." In thus supporting his decision, Mr. Coleman took advantage of the dereliction of duty by the Federal Aviation Administrator to authorize *Concorde* flights on the specious ground that there is no statute or regulation prohibiting the same. It is submitted that such decision is unconscionable, and seeks to take immoral ad-

⁴ Accord: 118 Cong. Rec. 18005 (remarks of Senator Buckley), 1516 (remarks of Representative Mikva), 1530 (Remarks of Representative Gude), 1530 and 1510-11 (remarks of Representative Addabbo), 1516 (remarks of Representative Ryan), 1523 (remarks of Representative Drinan), 1515-16 (remarks of Representative Wylder).

vantage of the unreasonable delay in the promulgation of supersonic noise regulations imposed upon the Administrator as a matter of law.

That it was Congress' intent to have supersonic noise regulations implemented before SSTs were placed in service is evident from the Senate debates before enactment. In the words of Senator Tunney, "It is my expectation and the Senate's clear intention that such [noise emission limitation] standards be proposed and implemented for supersonic transports under the provision of this bill before such aircraft are in commercial service" (118 Cong. Rec. 18645 [1972] see also 118 Cong. Rec. 17782 [remarks of Sen. Muskie], 18000 [Remarks of Sen. Case]).

Nor are local governmental units completely free to protect themselves by restricting operations of such aircraft into airports within their jurisdiction since this Court has ruled that the field of aircraft noise regulation was preempted. In *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973) it reasoned that a pervasive system of federal regulation was being established and that the procedures of the Noise Control Act of 1972 were being implemented to protect the local populations. Tragically, four years after that decision, we are still without noise regulations protecting the citizenry from supersonic air transport noise.⁵

Moreover, Secretary Coleman's decision renders the citizen's suit provisions of the Noise Control Act [42 USC §4911] meaningless since such suits envision enforcement of federal regulations, e.g. supersonic noise restrictions.

⁵ Arguing that failure to regulate is a waiver of such preemption by the Federal Government, County of Fairfax has recently enacted a local law and ordinance compelling supersonic aircraft to meet the same noise standards as had been previously promulgated by the FAA for subsonic aircraft.

In the absence of such regulations such suits are precluded leaving no remedy against SST noise emissions.

In summary, Secretary Coleman's decision to allow the *Concorde* SST to operate at Dulles and JFK on a commercial basis flies in the face of the Noise Control Act of 1972 and its amendment to Section 611. By authorizing SST landings in the United States *before* the mandated noise standards for SSTs are promulgated, the Secretary of Transportation has contravened the will of Congress and repudiated the purpose of the Act. Absent the right to restrict such flights by local law or citizens suits, the Petitioners and their constituents are without redress. Under such circumstances, judicial intervention to prevent frustration of the statutory scheme envisioned by Congress is clearly warranted. See *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1970), *aff'd* 448 F. 2d 793 (10th Cir. 1971).

II.

In order to protect the integrity of federal judicial review of administrative decisions this Court should grant certiorari to review the failure of the court below to remand for plenary review in the face of strong evidence that the Secretary's decision may have been influenced by factors *dehors* the record.

In announcing his decision to permit the *Concorde* SST to land in the United States, Secretary Coleman carefully delineated those documents, facts and events upon which he based his decision. He stated in part, at p. 2:

"Today's decision is based entirely on my review of the EIS, on the January 5 hearing and on my subsequent review of the transcript and other written materials submitted for the record. At the public hearings, the

United Kingdom's Minister of State for the Department of Industry and France's Director of Air Transport, Civil Action Department, each testified that there was no expressed or implied commitment that the United States and no one has brought to my attention any such expressed or implied agreement."

In the Secretary's decision, and subsequently in written and oral argument, the government has repeatedly sought to limit the scope of review to certain carefully structured documents and happenings which, when taken at face value, should inexorably lead to a finding of compliance with the standards for judicial review set forth in the Administrative Procedure Act, 5 U.S.C. §706.

After the Secretary's decision and, indeed, after the exchange of briefs, a Congressional subcommittee under Congressman Lester Wolff made available to petitioner's counsel a raft of internal Department of Transportation memorandum, letters and correspondence which support, by at least fair preponderance, the strong conviction that the decision to admit the *Concorde* SST into the United States was prompted by factors outside the record and was made principally by governmental officials other than the Secretary. These documents, produced by the Department of Transportation before the subcommittee on Future Foreign Policy Research and Development (House Committee on International Relations) and the subcommittee on Government Activities and Transportation (House Committee on Government Operation) deal primarily with the Executive decision-making process involving *Concorde* during the latter part of 1972 and early 1973.

Among the documents produced is a White House memorandum dated November 27, 1972 from Peter M. Flanigan addressed to Secretaries of State, Treasury, Commerce

and Transportation and to the Assistants to the President for National Security Affairs and Domestic Affairs. (App. p. 22a) In this confidential memorandum, Mr. Flanigan outlined the problems of the use of the *Concorde* in the United States to be discussed at a Senior Review Group meeting at the White House on December 11, 1972.

Of particular interest (aside from the technical discussion) is the delineation of three major options open to the Administration re *Concorde*: "(1) to seek actively to support the *Concorde*, (2) to proceed vigorously with U. S. environmental standards and insist that the *Concorde* must comply; and (3) take an essentially hands-off attitude allowing matters to work themselves out without intervention by the White House."

In discussing option 1 the 1972 memorandum sets forth what appears to be the "game plan" which culminated in Secretary Coleman's decision in 1976. Mr. Flanigan writes, "Under option 1, FAA would postpone a final rule on noise type certification standards for civil supersonic aircraft. . . The *Concorde's* certification and use would be treated as a unique situation meriting special consideration in respect to U. S. regulations governing supersonic aircraft and where possible, waivers or exemptions would be accorded when and where necessary to allow the aircraft to operate in this country. Actions on problems affecting the *Concorde* will be taken on a case-by-case basis as they arose, with consideration given where possible to postponement of actions which would, in effect, bar the aircraft." (App. p. 26a)

At the December 11, 1972 meeting among others in attendance were D.O.T. Undersecretary James Beggs and Mr. John Barnum, General Counsel [now Undersecretary] Department of Transportation. (App. p. 33a) Missing from the material produced is the memorandum from Mr. Flani-

gan documenting the course of action agreed to at this meeting, although such is referred to in a memorandum to the Secretary from Undersecretary of Transportation Beggs, dated December 27, 1972 (App. p. 20a) Mr. Beggs refers to the final link in the decision making process thusly: "the next step will be the President's replies to Heath and Pompidou. I'll keep you informed as significant developments occur." (App. p. 21a)

This final link is embodied in a letter to President Pompidou dated January 19, 1973 over the signature of Richard Nixon in which the former President states in part, "I can assure you, however, that to the extent that noise and other regulations are within the purview of the Federal Government, my Administration will assure equitable treatment for the Concorde. In keeping with this policy, the Federal Aviation Administration will issue its proposed fleet noise rule in a form that will make it inapplicable to the Concorde." (App. p. 17a) A letter similar in text and content was delivered to the British Embassy in Washington on January 22 entitled "President's Reply to Heath Letter" and in which Mr. Nixon states: "As a consequence of this policy, the Federal Aviation Administration will issue its proposed fleet noise rules in a form which will make it inapplicable to the Concorde." (App. p. 19a)

In view of these documents, the authenticity of which is uncontested, it is submitted that there is now before the Court some evidence to support petitioner's contention that the Secretary's decision may well have been influenced or governed by factors *dehors* the record. Since the present record fails to mention these factors, or whether they were considered, it was impossible for the Court of Appeals to determine if the Secretary acted within the scope of his authority or whether his action was justifiable under the applicable statutes and standards.

Section 706 requires a finding by the reviewing tribunal that the decision made was not "arbitrary, capricious and abusive, or otherwise not in accordance with law." To make this finding, the reviewing Court must consider whether the decision was based on a consideration of the relevant factors and whether there had been a clear error of judgment.

But the Administrative Procedure Act scope of review as interpreted by this Court does not require the reviewing tribunal to blindly accept the "record" as presented to it, unmindful of indisputable facts *dehors* the record which would compel a reasonable man to conclude that such record was willfully and woefully incomplete.

But no administrative decision should be based upon a record that is so incomplete either intentionally or through inadvertence. In such instance, the integrity of the scope of judicial inquiry demands that those administrative officials who participated in the decision give testimony to explain their action. In truth that may be "the only way there can be effective judicial review" in this case. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971) at 420.

And while Courts are reluctant to require administrative officials who participated in a decision to give testimony explaining their action, such inquiry may be made where there is a "strong showing of bad faith or improper behavior." *Citizens to Preserve Overton Park v. Volpe*, *supra*, at 420.

The problem created here by an incomplete and inadequate record and the facts underlying the entrance of the Concorde into the United States require at the very least a remission to the District Court for development of a full record, or in the alternative, a plenary inquiry into the underlying facts.

No controversy is more fateful both to the environment of the Eastern seaboard of the United States and to the delicate relations with Great Britain and France than that posed by this application for certiorari. The very integrity of the scope of judicial review is at stake, and such controversy is especially suited for determination by the Courts of the United States under the guidance of this honorable Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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APPENDIX

**Order of United States Court of Appeals
for the District of Columbia Circuit**

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Civil Action No. 76-0139

[No Opinion]

September Term, 1975—Filed May 19, 1976

No. 76-1105

ENVIRONMENTAL DEFENSE FUND, INC.,

Petitioner,

v.

U.S. DEPARTMENT OF TRANSPORTATION and

WILLIAM T. COLEMAN, JR., Secretary,

Respondents,

BRITISH AIRWAYS BOARD *et al.*,

Intervenors.

No. 76-1213

THE STATE OF NEW YORK,

Petitioner,

v.

U.S. DEPARTMENT OF TRANSPORTATION and

WILLIAM T. COLEMAN, JR., Secretary,

Respondents,

COMPAGNIE NATIONALE AIR FRANCE *et al.*,

Intervenors.

2a

*Order of United States Court of Appeals
for the District of Columbia Circuit*

No. 76-1259

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *et al.*,
Appellants,

v.

JOHN L. McLUCAS, Administrator,
FEDERAL AVIATION ADMINISTRATION, *et al.*

No. 76-1260

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA,
a body corporate, *et al.*,
Petitioners,

v.

WILLIAM T. COLEMAN, JR. and U.S. DEPARTMENT
OF TRANSPORTATION,
Respondents.

No. 76-1321

BOARD OF SUPERVISORS OF FAIRFAX COUNTY, VIRGINIA, *et al.*,
Petitioners,

v.

JOHN L. McLUCAS *et al.*,
Respondents.

Petitions for Review of an Order of the Secretary of
Transportation and an Order of the Administrator of the

3a

*Order of United States Court of Appeals
for the District of Columbia Circuit*

Federal Aviation Administration and Appeal from the
United States District Court for the District of Columbia.

Before:

WRIGHT, MCGOWAN and ROBB,

Circuit Judges.

ORDER

These causes came on to be heard on petitions for review of an order of the Secretary of Transportation, on a petition for review of an order of the Administrator of the Federal Aviation Administration, and on appeal from the United States District Court for the District of Columbia, and were argued by counsel.

The Secretary has decided, for the reasons stated in his opinion, "to permit British Airways and Air France to conduct limited scheduled commercial flights into the United States for a period not to exceed sixteen months under limitations and restrictions set forth [in that opinion]." The purpose of the trial period is to provide additional information to assist the Secretary in his evaluation of the "environmental, technological, and international considerations" which continued operation of Concorde into this country would involve.

This court is in agreement with the Secretary that in the circumstances of this case his order for such a trial period is within his authority and competence, and is not arbitrary or capricious or otherwise in violation of law.

On consideration of the foregoing, it is ORDERED by the court that the order of the Secretary is hereby affirmed.

*Order of United States Court of Appeals
for the District of Columbia Circuit*

It is FURTHER ORDERED by the court that the petition for review in No. 76-1321 is hereby dismissed.*

It is FURTHER ORDERED by the court that the appeal in No. 76-1259 is dismissed for want of jurisdiction. *See* Rule 54(b), Fed. R. Civ. P.

Per Curiam

For the Court

/s/ GEORGE A. FISHER
George A. Fisher
Clerk

* This action is without prejudice to consideration and disposition by the District Court of the mandamus action in Civil Action No. 76-0139.

Statutes Involved

§ 611 of the Federal Aviation Act of 1958, 49 U.S.C. § 1431, as amended by the Noise Control Act of 1972.

§ 1431. Control and abatement of aircraft noise and sonic boom—Definitions

(a) For purposes of this section:

- (1) The term "FAA" means Administrator of the Federal Aviation Administration.
- (2) The term "EPA" means the Administrator of the Environmental Protection Agency.

**CONSULTATIONS; STANDARDS; RULES AND
REGULATIONS; AIRCRAFT CERTIFICATES**

(b) (1) In order to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom, the FAA, after consultation with the Secretary of Transportation and with EPA, shall prescribe and amend standards for the measurement of aircraft noise and sonic boom and shall prescribe and amend such regulations as the FAA may find necessary to provide for the control and abatement of aircraft noise and sonic boom, including the application of such standards and regulations in the issuance, amendment, modification, suspension, or revocation of any certificate authorized by this subchapter. No exemption with respect to any standard or regulation under this section may be granted under any provision of this chapter unless the FAA shall have consulted with EPA before such exemption is granted, except that if the FAA determines that safety in air commerce or air transportation

Statutes Involved

requires that such an exemption be granted before EPA can be consulted, the FAA shall consult with EPA as soon as practicable after the exemption is granted.

(2) The FAA shall not issue an original type certificate under section 1423(a) of this title for any aircraft for which substantial noise abatement can be achieved by prescribing standards and regulations in accordance with this section, unless he shall have prescribed standards and regulations in accordance with this section which apply to such aircraft and which protect the public from aircraft noise and sonic boom, consistent with the consideration listed in subsection (d) of this section.

SUBMISSION OF PROPOSED REGULATIONS TO FAA BY
EPA; PUBLICATION; HEARING; REVIEW OF
PRESCRIBED REGULATIONS; REPORT AND
SUPPLEMENTAL REPORT

(c) (1) Not earlier than the date of submission of the report required by section 4906 of Title 42, EPA shall submit to the FAA proposed regulations to provide such control and abatement of aircraft noise and sonic boom (including control and abatement through the exercise of any of the FAA's regulatory authority over air commerce or transportation or over aircraft or airport operations) as EPA determines is necessary to protect the public health and welfare. The FAA shall consider such proposed regulations submitted by EPA under this paragraph and shall, within thirty days of the date of its submission to the FAA, publish the proposed regulations in a notice of proposed rulemaking. Within sixty days after such

Statutes Involved

publication, the FAA shall commence a hearing at which interested persons shall be afforded an opportunity for oral (as well as written) presentations of data, views, and arguments. Within a reasonable time after the conclusion of such hearing and after consultation with EPA, the FAA shall—

(A) in accordance with subsection (b) of this section, prescribe regulations (i) substantially as they were submitted by EPA, or (ii) which are a modification of the proposed regulations submitted by EPA, or

(B) publish in the Federal Register a notice that it is not prescribing any regulation in response to EPA's submission of proposed regulations, together with a detailed explanation providing reasons for the decision not to prescribe such regulations.

(2) If EPA has reason to believe that the FAA's action with respect to a regulation proposed by EPA under paragraph (1) (A) (ii) or (1) (B) of this subsection does not protect the public health and welfare from aircraft noise or sonic boom, consistent with the considerations listed in subsection (d) of this section, EPA shall consult with the FAA and may request the FAA to review, and report to EPA on, the advisability of prescribing the regulation originally proposed by EPA. Any such request shall be published in the Federal Register and shall include a detailed statement of the information on which it is based. The FAA shall complete the review requested and shall report to EPA within such time as EPA specifies in the request, but such time specified may not be less than ninety days from the date the request was made.

Statutes Involved

The FAA's report shall be accompanied by a detailed statement of the FAA's findings and the reasons for the FAA's conclusions; shall identify any statement filed pursuant to section 4332(2) (C) of Title 42 with respect to such action of the FAA under paragraph (1) of this subsection; and shall specify whether (and where) such statements are available for public inspection. The FAA's report shall be published in the Federal Register, except in a case in which EPA's request proposed specific action to be taken by the FAA, and the FAA's report indicates such action will be taken.

(3) If, in the case of a matter described in paragraph (2) of this subsection with respect to which no statement is required to be filed under such section 4332(2) (C) of Title 42, the report of the FAA indicates that the proposed regulation originally submitted by EPA should not be made, then EPA may request the FAA to file a supplemental report, which shall be published in the Federal Register within such a period as EPA may specify (but such time specified shall not be less than ninety days from the date the request was made), and which shall contain a comparison of (A) the environmental effects (including those which cannot be avoided) of the action actually taken by the FAA in response to EPA's proposed regulations, and (B) EPA's proposed regulations.

CONSIDERATIONS DETERMINATIVE OF STANDARDS,
RULES, AND REGULATIONS

(d) In prescribing and amending standards and regulations under this section, the FAA shall—

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(1) consider relevant available data relating to aircraft noise and sonic boom, including the results of research, development, testing, and evaluation activities conducted pursuant to this chapter and chapter 23 of this title;

(2) consult with such Federal, State, and interstate agencies as he deems appropriate;

(3) consider whether any proposed standard or regulation is consistent with the highest degree of safety in air commerce or air transportation in the public interest;

(4) consider whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply; and

(5) consider the extent to which such standard or regulation will contribute to carrying out the purposes of this section.

AMENDMENT, MODIFICATION, SUSPENSION, OR
REVOCATION OF CERTIFICATE; NOTICE AND
APPEAL RIGHTS

(e) In any action to amend, modify, suspend, or revoke a certificate in which violation of aircraft noise or sonic boom standards or regulations is at issue, the certificate holder shall have the same notice and appeal rights as are contained in section 1429 of this title, and in any appeal to the National Transportation Safety Board, the Board may amend, modify, or reverse the order of the FAA if it finds that control or

Statutes Involved

abatement of aircraft noise or sonic boom and the public health and welfare do not require the affirmation of such order, or that such order is not consistent with safety in air commerce or air transportation.

Pub.L. 85-726, Title VI, § 611, as added Pub.L. 90-411, § 1, July 21, 1968, 82 Stat. 395, and amended Pub.L. 92-574, § 7(b), Oct. 27, 1972, 86 Stat. 1239.

§ 2 of the Noise Control Act of 1972, 42 U. S. C. § 4901.

§ 4901. Congressional findings and statement of policy

(a) The Congress finds—

(1) that inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population, particularly in urban areas;

(2) that the major sources of noise include transportation vehicles and equipment, machinery, appliances, and other products in commerce; and

(3) that, while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment.

(b) The Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare. To that end, it is the purpose of this chapter to establish a means for effective coordination of Federal research and activities in noise control, to authorize the establishment of Federal noise emission standards for products distributed in commerce, and

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to provide information to the public respecting the noise emission and noise reduction characteristics of such products.

Pub.L. 92-574, § 2, Oct. 27, 1972, 86 Stat. 1234.

§ 12(a) of the Noise Control Act of 1972, 42 U.S.C. § 4911

§ 4911. Citizen suits—Authority to commence suits

(a) Except as provided in subsection (b) of this section, any person (other than the United States) may commence a civil action on his own behalf—

(1) against any person (including (A) the United States, and (B) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any noise control requirement (as defined in subsection (e) of this section), or

(2) against—

(A) the Administrator of the Environmental Protection Agency where there is alleged a failure of such Administrator to perform any act or duty under this chapter which is not discretionary with such Administrator, or

(B) the Administrator of the Federal Aviation Administration where there is alleged a failure of such Administrator to perform any act or duty under section 1431 of Title 49 which is not discretionary with such Administrator.

The district courts of the United States shall have jurisdiction, without regard to the amount in con-

Statutes Involved

troversy, to restrain such person from violating such noise control requirement or to order such Administrator to perform such act or duty, as the case may be.

NOTICE

(b) No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the violation (i) to the Administrator of the Environmental Protection Agency (and to the Federal Aviation Administrator in the case of a violation of a noise control requirement under such section 1431 of Title 49) and (ii) to any alleged violator of such requirement, or

(B) if an Administrator has commenced and is diligently prosecuting a civil action to require compliance with the noise control requirement, but in any such action in a court of the United States any person may intervene as a matter of right, or

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice to the defendant that he will commence such action.

Notice under this subsection shall be given in such manner as the Administrator of the Environmental Protection Agency shall prescribe by regulation.

Statutes Involved

INTERVENTION

(c) In an action under this section, the Administrator of the Environmental Protection Agency, if not a party, may intervene as a matter of right. In an action under this section respecting a noise control requirement under section 1431 of Title 49, the Administrator of the Federal Aviation Administration, if not a party, may also intervene as a matter of right.

LITIGATION COSTS

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate.

OTHER COMMON LAW OR STATUTORY
RIGHTS OF ACTION

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any noise control requirement or to seek any other relief (including relief against an Administrator).

"NOISE CONTROL REQUIREMENT" DEFINED

(f) For purposes of this section, the term "noise control requirement" means paragraph (1), (2), (3), (4), or (5) of section 4909(a) of this title, or a standard, rule, or regulation issued under section 4916 or 4917 of this title or under section 1431 of Title 49.

Pub.L. 92-574, § 12, Oct. 27, 1972, 86 Stat. 1243.

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Federal Aviation Act, Section 1001; 49 U.S.C. 1486
§ 1486. Judicial review

ORDERS SUBJECT TO REVIEW; PETITION FOR REVIEW

(a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

VENUE

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

NOTICE TO BOARD OR ADMINISTRATOR; FILING OF RECORD

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of Title 28.

POWER OF COURT

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to

Statutes Involved

affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

CONCLUSIVENESS OF FINDINGS OF FACT; OBJECTIONS

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

REVIEW BY SUPREME COURT

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of Title 28.

Pub.L. 85-726, Title X, § 1006, Aug. 23, 1958, 72 Stat. 795;
Pub.L. 86-546, § 1, June 29, 1960, 74 Stat. 255; Pub.L. 87-225, § 2, Sep. 13, 1961, 75 Stat. 497.

Administrative Procedure Act, 5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and

Statutes Involved

determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

**Text of President Nixon's Letter of January 19, 1973
to President Pompidou**

As you know, I have followed the progress of the Concorde for many years. Therefore, I particularly welcome your recent letter discussing the prospects and the problems which it may face in conforming to certain proposed Federal regulations on excessive aircraft noise.

This Administration is committed to the principle that governments should minimize interference with commercial transactions whether the purchasers be private parties or other governments and to the principle of non-discriminatory formulation and application of Federal regulations. Accordingly, I am sure that United States officials will make every effort to see that the Concorde can compete on its merits for sales in this country.


You must know, Mr. President, that many aspects of regulation of civil aviation are outside the jurisdiction and the control of the executive branch of our Federal Government. The Congress, the Civil Aeronautics Board at the Federal level, as well as State and local governments, have substantial powers in this field. I can assure you, however, that to the extent that noise and other regulations are within the purview of the Federal Government, my Administration will assure equitable treatment for the Concorde. In keeping with this policy, the Federal Aviation Administration will issue its proposed fleet noise rule in a form which will make it inapplicable to the Concorde. I have also directed officials of my Administration to continue to work with representatives of the French and British governments in order to determine whether a United States supersonic aircraft noise standard can be developed which will meet our domestic requirements without inhibiting the prospects of the Concorde.

With warm personal regards,

Sincerely, Richard Nixon.

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Text of President Nixon's Letter of January 19, 1973
to Prime Minister Heath

(See Opposite) 



DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

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SUBJ: CIVAIR - CONCORDE: PRESIDENTS REPLY TO HEATH LETTER

1. FOR EMBASSY'S INFORMATION, FOLLOWING IS TEXT, AS
RECEIVED FROM WHITE HOUSE, OF PRESIDENT NIXON'S REPLY OF
JAN. 19, 1973 TO PRIME MINISTER HEATH'S LETTER OF DEC. 11,
1972 CONCERNING THE CONCORDE:

"DEAR MR. PRIME MINISTER:

I WELCOME YOUR RECENT LETTER CONCERNING THE PROBLEMS
WHICH THE CONCORDE MAY FACE IN CONFORMING TO PROPOSED
FEDERAL REGULATIONS ON EXCESSIVE AIRCRAFT NOISE. THIS
IS, AS WE BOTH RECOGNIZE, AN ISSUE OF MAJOR IMPORTANCE
WITH BOTH DOMESTIC AND INTERNATIONAL IMPLICATIONS.

I CAN ASSURE YOU THAT MY ADMINISTRATION WILL MAKE EVERY

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

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EFFORT TO SEE THAT THE CONCORDE IS TREATED FAIRLY IN ALL ASPECTS OF UNITED STATES GOVERNMENTAL REGULATION, SO THAT IT CAN COMPETE FOR SALES IN THIS COUNTRY ON ITS MERITS. AS A CONSEQUENCE OF THIS POLICY, THE FEDERAL AVIATION ADMINISTRATION WILL ISSUE ITS PROPOSED FLEET NOISE RISE IN A FORM WHICH WILL MAKE IT INAPPLICABLE TO THE CONCORDE.

will call me to discuss this

I HAVE ALSO DIRECTED OFFICIALS OF MY ADMINISTRATION TO CONTINUE TO WORK WITH REPRESENTATIVES OF THE BRITISH AND FRENCH GOVERNMENTS IN ORDER TO DETERMINE WHETHER A UNITED STATES SUPERSONIC AIRCRAFT NOISE STANDARD CAN BE DEVELOPED THAT WILL MEET OUR DOMESTIC REQUIREMENTS WITHOUT DAMAGING THE PROSPECTS OF THE CONCORDE.

YOU HAVE NOTED, MR. PRIME MINISTER, THAT MANY ASPECTS OF THE REGULATION OF CIVIL AVIATION ARE IN THIS COUNTRY OUTSIDE THE JURISDICTION OF THE EXECUTIVE BRANCH OF OUR FEDERAL GOVERNMENT. YOU MUST ALSO KNOW THAT THE FEDERAL GOVERNMENT'S POWER TO INFLUENCE THESE ASPECTS, PARTICULARLY WITH REGARD TO STATE AND LOCAL JURISDICTIONS, IS LIMITED. ON THE OTHER HAND, MY ADMINISTRATION IS COMMITTED TO PRINCIPLES OF NON-INTERFERENCE WITH FREE AND PRIVATE COMMERCE AND NON-DISCRIMINATORY FORMULATION AND APPLICATION OF FEDERAL REGULATIONS. WE WILL ACT IN KEEPING WITH THESE PRINCIPLES TO ASSURE EQUITABLE TREATMENT FOR THE CONCORDE, BEARING IN MIND THAT IT, LIKE ALL SUPERSONIC AIRCRAFT, RAISES UNPRECEDENTED PROBLEMS OF ENVIRONMENTAL AND SOCIAL COSTS.

WITH WARM PERSONAL REGARDS, -

2. REPLY DELIVERED UK EMBASSY WASHINGTON JAN. 22. COPIES BOTH LETTERS AIRPOUCHED EMBASSY.

EXEMPT ROGERS

James M. Beggs' Memorandum of December 27, 1972

[EMBLEM]

THE UNDER SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

December 27, 1972

(With TAB A Attached)

MEMORANDUM FOR: The Secretary

SUBJECT: Concorde Noise Problems

Attached (TAB A) is a memorandum from Peter Flanigan documenting the course of action agreed to at a December 11, 1972 meeting at the White House.

Strong letters to the President from President Pompidou and Prime Minister Heath were received during the week of December 11. While we do not have copies, they essentially express British and French concern about the impact of the proposed noise NPRM's on the Concorde. They have not been replied to as yet, but I understand they will indicate our intentions as outlined in paragraphs numbered 1 and 2 of Flanigan's memorandum.

On December 20th, we met with a high level Anglo-French team here at DOT, as we had previously agreed. (Roster of particulars attached, TAB B). At the outset of the meeting, we explained the extent and nature of current U.S. environmental concerns and the foreseen impact of the new Noise Control Act, advised them we were prepared to exchange technical (not political) information on the NPRM's and the Concorde, and informed them that, by

James M. Beggs' Memorandum of December 27, 1972

law, we were required to place a summary of the substantive points discussed during the meeting in the NPRM's official docket, which would be made available to the public when the NPRM's were issued. (The Anglo-French team have agreed to provide us with a draft report, which, subject to our concurrence, will be placed in the docket).

Predictably, the Concorde team then proceeded to recite a number of technical and procedural points arguing in favor of issuance of a proposed NPRM on SST noise which incorporated an exception for the Concorde, granted on the basis utilized for the early models of the Boeing 747: i.e., an application for a type certificate for the 747 was made before FAR 36 was issued.

In response to a direct question, we informed them that we did not expect that a noise NPRM would be promulgated before mid-January because of the need, under the new Noise Act, to receive EPA's initial comments. (They are expected to cursory: EPA will indicate interest and reserve the right to comment further.)

The tone of our meeting was cordial; as was the case with separate meetings the Concorde team leaders held the following day with Secretary Rogers, Peter Flanigan, and me. I understand that essentially the same points were made with Flanigan and Rogers as with me: they indicated the extent of their concern with the possible negative impacts of the proposed rules on the Concorde.

The next step will be the President's replies to Heath and Pompidou. I will keep you informed as significant developments occur.

/s/ J.M.B.

James M. Beggs

**Peter M. Flanigan's Memorandum of
November 27, 1972**

CONFIDENTIAL

**THE WHITE HOUSE
WASHINGTON**

November 27, 1972

MEMORANDUM FOR: THE SECRETARY OF STATE
THE SECRETARY OF THE TREASURY
THE SECRETARY OF COMMERCE
THE SECRETARY OF TRANSPORTATION
ASSISTANT TO THE PRESIDENT FOR
NATIONAL SECURITY AFFAIRS
ASSISTANT TO THE PRESIDENT FOR
DOMESTIC AFFAIRS

Attached is a memorandum describing the problems connected with the certification of the Concorde for use in the US and presenting three optional courses of action. I trust you will be able to attend a Senior Review Group meeting to discuss these options in the Roosevelt Room on Monday, December 11, at 3:30 P.M.

/s/ PMF

Peter M. Flanigan

**PROBLEMS AFFECTING THE USE OF THE
CONCORDE IN THE UNITED STATES**

There are a number of problems facing the Administration with the expected entry into service of the Anglo-French *Concorde* in 1975. On the one hand there will be very strong pressures from the British and French govern-

*Peter M. Flanigan's Memorandum of
November 27, 1972*

ments to gain approval of the *Concorde* by the U.S. Government. On the other we anticipate increasing Congressional and public pressures to ban the *Concorde* because it does not and probably cannot meet U.S. environmental standards, particularly with respect to noise.

A summary of the more important problems and anticipated U.S. actions which will impact on the *Concorde* follows (these problems are outlined in more detail in Tabs A through H.)

The distinction between *certification* and *use* should be borne in mind in considering the effects of anticipated U.S. government actions on the *Concorde*. In order for U.S. airlines to operate this aircraft, it must be issued a type certificate by the Federal Aviation Administration. Actions such as establishing noise standards for civil supersonic aircraft bear only on type certification and will determine whether the *Concorde* can be sold to U.S. airlines. On the other hand there are actions such as setting fare levels and operating procedures which will affect the use of the aircraft in the U.S. by foreign air lines, even if type certification is not granted. Finally, there are actions such as the application of engine emission standards which will affect *both certification and use*.

A prompt decision is needed as to whether the FAA should issue a Notice of Proposed Rule Making in regard to the fleet noise levels of U.S. airlines.

A. The FAA is anxious to release immediately a notice of proposed rule making (NPRM) which would progressively reduce the average level of noise in U.S. airline fleets until all aircraft meet current standards. Given the high noise level of the *Concorde*, this rule on fleet noise

*Peter M. Flanigan's Memorandum of
November 27, 1972*

would discourage possible U.S. purchases of the aircraft. Because certain states have taken action on noise standards due to the alleged failure of the Federal Government to establish such standards, FAA feels under great pressure to release this NPRM immediately. This rule itself would affect only U.S. purchasers of the *Concorde* and would not prevent its operation in U.S. airspace by foreign operators.

B. The FAA also has ready for publication an NPRM which requires that SST's meet the subsonic noise standards of FAA Part 36. Since the *Concorde* will not meet this standard, the British and French will undoubtedly request an exemption. Such request of course will meet with opposition from environmentalists and a high level decision will undoubtedly be required. This rule by itself would affect only U.S. purchasers of the *Concorde* and would not prevent its operation in U.S. airspace by foreign operators.

C. The *Concorde* will have difficulty meeting an FAA safety requirement on fueling-inerting for type certification and rules governing operation of aircraft in U.S. airspace.

D. The Environmental Protection Agency (EPA) has developed a rule governing engine emissions which *Concorde* may not be able to meet. This rule is being reviewed by the OMB because of its possible economic impact on certain U.S. aircraft.

E. There is a possibility of direct Congressional action through legislation to prohibit the operation in U.S. air-

*Peter M. Flanigan's Memorandum of
November 27, 1972*

space of any SST which does not meet current subsonic noise standards. The President would be under great pressure from the environmentalists to sign such a bill which the British and French would consider an unfriendly act.

F. The CAB insists that the fares established for the *Concorde* be economic and cover costs. This could mean a *Concorde* fare so high that few people would utilize it.

G. Notwithstanding any Federal action regarding *Concorde*, U.S. airport operators could well decide simply to ban the aircraft because of local reaction.

H. There is public and Congressional concern that commercial operation of civil supersonic transports would adversely affect the environment.

We feel the Administration is faced with three major options: (1) to seek actively to support the *Concorde*, (2) to proceed vigorously with U.S. environmental standards and insist that the *Concorde* must comply; and (3) to take an essentially hands-off attitude allowing matters to work themselves out without intervention by the White House. (We point out that Administration decisions may well be inhibited or preempted by Congressional action or local airport authority rules).

Option 1:

Notify the British and French of the problems facing the *Concorde* in the U.S. and indicate that the Administration is prepared to do what is possible to admit the aircraft.

*Peter M. Flanigan's Memorandum of
November 27, 1972*

Under Option 1, FAA would postpone a final rule on noise type certification standards for civil supersonic aircraft (the fleet noise rule could be published, however). The *Concorde's* certification and use would be treated as a unique situation meriting special consideration in respect to U.S. regulations governing supersonic aircraft and where possible, waivers or exemptions would be accorded when and where necessary to allow the aircraft to operate in this country. Actions on problems affecting the *Concorde* would be taken on a case-by-case basis as they arose, with consideration given where possible to postponement of actions which would, in effect, bar the aircraft. U.S. airlines may well decide on economic grounds not to purchase the *Concorde*, which would render U.S. actions on certification of the aircraft moot.

Advantages

(a) Would counteract British and French suspicions that U.S. seeks to bar *Concorde* for commercial advantage.

(b) Would permit the investigation of novel solutions to problem of *Concorde* noise, including the use of airports such as Bangor, Maine, where noise may not be crucial problem.

(c) Would permit the U.S. to have some bargaining leverage with the British and French for a period of time.

Disadvantages

(a) Congress could take initiative and legislatively bar *Concorde* from the U.S.

*Peter M. Flanigan's Memorandum of
November 27, 1972*

(b) President could be subject to domestic criticism that Administration favored British and French at expense of legitimate U.S. environmental interest.

Option 2

Proceed vigorously with U.S. environmental standards and insist that the *Concorde* must comply.

In implementing Option 2 we would inform the French and British that the *Concorde* does not appear to be able to meet the U.S. environmental standards which will apply to the aircraft in the areas of noise and engine emissions and we are not in a position to waive these standards for the *Concorde*. FAA would issue the NPRM on noise type certification requirements as well as the fleet noise NPRM and proceed expeditiously to a final rule.

Advantages

(a) Would be applauded by environmentalists.

(b) Would lessen legislative initiatives to regulate or bar SSTs, thus giving the Administration more flexibility in dealing later on with advanced SST's (including U.S.).

Disadvantages

(a) Would provoke strong reaction from British and French possibly including higher European Economic Community tariffs and additional preferences to European aircraft over U.S.-manufactured transports.

Option 3:

Permit the various problems to work themselves out without intervention by the White House.

*Peter M. Flanigan's Memorandum of
November 27, 1972*

Under Option 3 the British and French would simply be informed of the various difficulties in the U.S. facing the *Concorde*. They would be advised that the responsible U.S. agencies are examining these difficulties and will keep in touch with the British and French on developments. The questions on certification, noise levels, and engine emissions would be decided on their merits and the British and French would be given every opportunity to present their case for the *Concorde*. FAA would issue the NPRM on supersonic noise levels and act on any resulting application for a waiver.

Advantage

(a) Would avoid domestic criticism that the President has been influenced by British and French.

(b) Would put British and French on notice of problems facing *Concorde* in U.S.

Disadvantage

(a) Might result in stringent regulations for SST use which would preclude not only *Concorde*, but any future U.S. SST from being operated in this country.

(b) Would result in strong reaction, and possible retaliation by British and French should the *Concorde* be kept out.

**Peter M. Flanigan's Memorandum of
December 19, 1972**

CONFIDENTIAL

**THE WHITE HOUSE
WASHINGTON**

DEC 19 1972

MEMORANDUM FOR: THE SECRETARY OF STATE
THE SECRETARY OF THE TREASURY
THE SECRETARY OF COMMERCE
THE SECRETARY OF TRANSPORTATION
ASSISTANT TO THE PRESIDENT FOR
NATIONAL SECURITY AFFAIRS
ASSISTANT TO THE PRESIDENT FOR
DOMESTIC AFFAIRS

Attached is a set of minutes of the meeting held on December 11, 1972 which dealt with problems connected with the certification of the *Concorde* for use in the United States.

PETER M. FLANIGAN

MINUTES OF REVIEW GROUP DISCUSSION OF PROBLEMS
CONNECTED WITH CERTIFICATION OF THE CONCORDE
FOR USE IN THE UNITED STATES

Roosevelt Room
The White House

December 11, 1972
3:30-5:00 p.m.

Attending were: Secretary Rogers, Under Secretary Volker, Under Secretary Beggs, Assistant Secretary Gibson, Assistant Secretary Hazard, Mr. Barnum, Mr. Rein, Mr. Sonnenfeldt, Mr. Gunning and Mr. Flanigan.

*Peter M. Flanigan's Memorandum of
December 19, 1972*

Mr. Flanigan had circulated prior to the meeting as a basis for the discussion a memorandum titled "Problems Affecting the Use Of The Concorde In The United States". The Secretary of Transportation also circulated before the meeting a memorandum setting forth the DOT recommendations on issues set forth in the memorandum circulated by Mr. Flanigan.

The meeting opened, after a statement by Mr. Flanigan, with comments by Secretary Rogers on the nature of the Concorde problems and the importance of the Concorde to the British and French governments. Mr. Beggs then gave a description of the history and status of FAA rule-making proceedings which affect the Concorde: the fleet noise rule and the adoption of noise standards for supersonic aircraft. He pointed out that no publication had been made on the fleet noise rule whereas a proposed rule to apply subsonic noise standards (FAR 36) to supersonic aircraft had been published in 1970. He also indicated that Boeing 747s built after the promulgation of FAR 36 had been exempted from its terms until later models were able to comply and that those exempted 747s and many other aircraft (such as the Boeing 707) built before adoption of FAR 36 do not comply with those noise standards and have not been required to be retrofitted to do so.

The meeting then dealt with eight specific issues affecting the Concorde.

The following decisions were unanimously approved after individual discussion:

1. *Fleet Noise Rule:* DOT will redraft the advanced notice of the proposed rule on consultation with Mr. Rein so as to exempt the Concorde, directly or in-

*Peter M. Flanigan's Memorandum of
December 19, 1972*

directly from its terms. This draft will be delivered to the White House so that the timing of its release can be coordinated properly with other foreign policy considerations.

2. *Supersonic Noise Standards:* At the time that the advanced notice of the proposed fleet noise rule is released an announcement will be made that once comments on it are received, NPRM's will be published simultaneously with respect both to the fleet noise rule and the supersonic noise standards. A joint environmental impact statement on the two rules will also be filed when the NPRM's are published.

3. *Fuel System Safety and Operating Rules:* The question of a nitrogen inerting system for the Concorde fuel tanks is a technical safety question and will be left to the judgment of the FAA. Messrs. Barnum and Rein will look into whether the U.S. can impose nitrogen inerting system requirements on airplanes flown into the U.S. by non-U.S. flag carriers.

Unless the FAA argues strongly that the special operating procedures requested for the Concorde are also safety problems, we will attempt to be cooperative on this issue, particularly if the Concorde is limited to landing at Dulles (and possibly a few other airports).

4. *Engine Emissions:* EPA is to publish an NPRM on December 12 with respect to airplane engine emissions. It was reported that the standards would be effective for planes built after 1975 with exemptions possibly through 1978. Since the British and French have not viewed this proceeding with great alarm, and in light of the possibility of exemptions until 1979, the

*Peter M. Flanigan's Memorandum of
December 19, 1972*

Administration will take no action on this subject. However, Mr. Rein will brief the British and French representatives on the impact of the proposed rule on the Concorde.

5. *Possible Congressional Action Against Concorde:* This will be faced on an issue by issue basis. If the British and French want to know our general attitude toward anti-Concorde legislation, they should be cited to our opposition to the Granston Amendment this fall.

6. *Rates and Fares:* This is completely within the province of the CAB. Thus the Administration will not become involved in questions of ticket prices for the Concorde.

7. *State, Local and Proprietor Regulations:* DOT presently asserts that it has the legal authority to preempt state and local noise regulations although there is some law and argument to the contrary. The Administration will not now seek to make federal noise regulations preempt state and local noise regulations. It is noted in this regard that Britain and France plan to make only one airport in each country available to the Concorde.

8. *Environmental Affect:* DOT has studies underway on possible environmental affects of the Concorde. These studies will be continued.

In addition to the foregoing, it was agreed that DOT would provide Mr. Flanigan with estimates of the economic impact of the fleet noise rule and the EPA engine emission standards on U.S. airlines.

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EYES ONLY

January 26, 1973

Concorde

General Counsel

The Secretary

The FAA has instructions to publish an advance notice of proposed rules making (ANPRM) concerning the fleet noise level (FNL) of air carriers engaged in interstate air commerce, and expressly excluding air carriers engaged (or to the extent they are engaged) in foreign air commerce (*i.e.*, international). This rule would therefore not be applicable to Concorde insofar as the North Atlantic is concerned, and Pan Am and the other American carriers could purchase it for that and other international routes. The British are concerned because this seems to be inconsistent with the letter the President wrote to Prime Minister Heath (and President Pompidou) in which he stated that the FNL would be "inapplicable" to the Concorde. (Copies of his two letters are attached.)

Strictly speaking, the ANPRM is applicable to Concorde because flights between California and Hawaii and Alaska, or between New York and Miami, are "interstate". Thus, the rule would apply to aircraft operated by U.S. carriers on those routes, and as a practical matter would prevent carriers from using Concorde on those routes.

Our answer is that the stated concern of the British (and French) was that Pan Am and the other American carriers be able to purchase Concorde for use on the North

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Atlantic, and the rule we have written will permit that. Our second answer is that writing the rule in the fashion we have done, rather than writing a rule that would expressly not apply to SSTs, is less likely to result in Congressional action banning SSTs altogether.

The White House staff thinks that we should be very firm on the present ANPRM and that we should publish it promptly. A copy of the ANPRM is also attached hereto.

Dick Skully of the FAA is invited to your 3:30 meeting with Secretary Walker. He participated in drafting this ANPRM, but he is not privy to anything more than the ANPRM. You and I have the only copies of the President's letters, although Bob Binder knows that such a letter was to be sent.

John W. Barnum

Attachments

JWBarnum:ajg:TGC-1:1/26/73